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IN THE

Supreme Court of the United States

OCTOBER TERM, 1949.

No. 131

FREDA GOODMAN,

Petitioner,

vs.

CITY OF CHICAGO, a Municipal Corporation,

Respondent.

BRIEF IN OPPOSITION TO PETITION FOR CERTIORARI.

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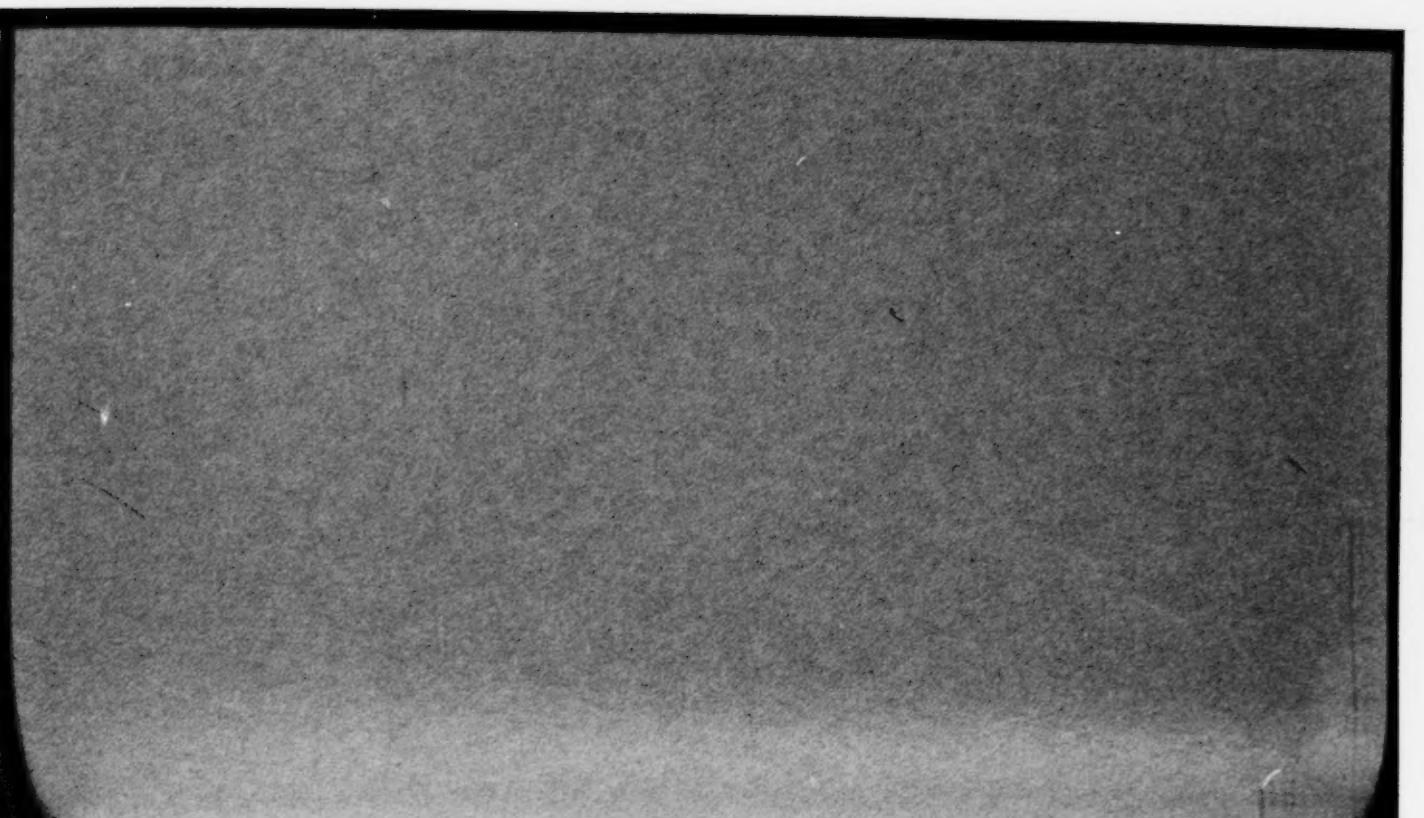

INDEX.

Summary of Argument

PAGE

I. No basis for assumption of jurisdiction by this court is present in this case..... 1-6

Conclusion 7

Table of Cases

Boss v. District of Columbia, 134 Fed. (2) 14..... 5

Bradford v. City of Chicago, 25 Ill. 141..... 5

Chapralis v. City of Chicago, 389 Ill. 269..... 3

Cohen v. City of Chicago, 377 Ill. 221..... 2

Cox v. Commissioners of Highways, 194 Ill. 355, 360.. 6

District of Columbia v. Thompson, 281 U. S. 25, 73 L. ed. 677..... 5

Durfee v. P. D. & E. Ry. Co., 140 Ill. 435, 439..... 6

Goodman v. City of Chicago, 336 Ill. App. 126..... 2

McConville v. City of St. Paul, 75 Minn. 383, 77 N. W. 993 5

Shirk v. City of Chicago, 195 Ill. 298, 313..... 6

Tidal Oil Co. v. Flanagan, 263 U. S. 455, 68 L. ed. 387.. 4

Woodruff v. Chicago, 394 Ill. 542..... 2

IN THE

Supreme Court of the United States

OCTOBER TERM, 1949.

No. 878

FREDA GOODMAN,

Petitioner,

vs.

CITY OF CHICAGO, a Municipal Corporation,

Respondent.

BRIEF IN OPPOSITION TO PETITION FOR CERTIORARI.

MAY IT PLEASE THE COURT:

The respondent, City of Chicago, a municipal corporation, opposes the petition for certiorari on the following grounds:

I.

No basis for assumption of jurisdiction by this court is present in this case.

The petitioner confuses and commingles an argument based on the deduction from an award in condemnation of a special assessment with an argument based on a claim

for refund of the special assessment on the ground that the improvement for which the special assessment was levied and paid has been abandoned. The two bases are in no way connected, and the joining of them can serve no useful purpose. It has been held by the Supreme Court of Illinois, that the right to receive an award in condemnation without diminution for special assessments may be waived, and if the property owner accepts the award and permits the deduction of the special assessment he is estopped to assert any claim and is held to have accepted the payment in full satisfaction of his claim. *Cohen* v. *City of Chicago,* 377 Ill. 221, sets forth in detail the manner in which these payments were made and the rules of law applicable thereto.

Actually, petitioner makes no claim for refund of the special assessment deducted from the award, except that the improvement was abandoned. The claim of abandonment of improvement is based on the case of *Woodruff* v. *Chicago,* 394 Ill. 542. But the decision in the instant case in the Appellate Court of Illinois, 336 Ill. App. 126, discloses that the record made in this case shows that events which took place after the *Woodruff* case was tried indicate a factual situation which so differed from that at the time of the *Woodruff* trial as to take it out of the effect of that decision. That the Supreme Court of Illinois reached the same conclusion is evident from its denial of the petition for leave to appeal in this case.

Petitioner's point 1, under the heading "Jurisdiction," is manifestly unsound because the complaint (Tr. 1-3) claims a refund of the assessment only on the strength of the *Woodruff* case holding that the improvement was abandoned. The claim that just compensation was denied was not made until the motion for summary judgment

(Tr. 9). Any claim based on the deduction of the assessment from the award would be barred by the *Cohen* case holding that the judgment creditor is estopped to deny that the condemnation award was satisfied. The only basis for relief apparent in the complaint is based on abandonment of the improvement. Plaintiff is in no position to complain that a constitutional right to just compensation has been violated by her own acceptance of payment without objection or complaint. No question of just compensation for property taken is involved here.

Petitioner's second jurisdictional point (p. 4) argues that the delay in completing the improvement impairs the obligation of a contract. This argument constitutes a change of face on petitioner's part because the very *Woodruff* decision, on which she predicated her claim, held that completion of the improvement, even after suit had been instituted, was a defense to the claim for refund. It should also be noted that this point was not raised in the trial court. The motion for summary judgment, the first time any Federal constitutional point was mentioned, alleges only that the failure of the city to use the money deducted from the award violates the 14th Amendment (Tr. 9, par. 3), and in paragraph 11 of the motion (Tr. 12) plaintiff alleges that the failure of the city to use the money for improving Taylor Street constitutes a taking of property without just compensation in violation of the 14th Amendment.

From this it is apparent that the only question submitted to the trial court, under the Federal Constitution, was that of "just compensation." The Appellate Court pointed out (Pet. p. 16) that this allegation did not present a constitutional question, but rather, a question of fact as to the use of the money, relying on *Chapralis* v. *City of Chicago,* 389 Ill. 269.

Petitioner is in no position to complain on any score because, as the Appellate Court points out, the improvement has been completed and she has received the benefit of the money she was assessed. In fact, she has received much more than she paid for.

From the *Woodruff* opinion (394 Ill. at p. 545) it will be seen that the city assessed the owners of property along Taylor Street for the cost of acquiring the additional land needed for widening the street, but none of the assessments for the improvement *by paving* Taylor Street have ever been placed in collection or paid. From the Appellate Court opinion in the instant case it appears (Pet. pp. 13-14) that Taylor Street was paved out of Motor Fuel Tax funds. The petitioner has, it will be seen, received an improvement consisting of a widening and paving yet has been assessed only for the acquisition of the land necessary for widening but has never been assessed or asked to pay for the completion of the improvement—the paving thereof. It will therefore be seen that she received much more than she paid for, yet she seeks the refund of that small portion of the cost of the improvement which she did pay.

No Federal question relating to impairment of contract was ever raised or passed upon by the State court. "A mere denial of the petition by the state court, without opinion, is not enough" to justify the assumption of jurisdiction by this court. *Tidal Oil Co.* v. *Flanagan*, 263 U. S. 455, 68 L. ed. 387. Furthermore, this case does not involve any law passed by the state, but only a judgment of the court based on local law, and this court has therefore no basis in this record for assuming jurisdiction by virtue of any claim under Section 10, Article I of the Constitution.

Petitioner's third jurisdictional point rests on the basis that she has been denied the equal protection of the laws

because Woodruff, in the case referred to, obtained a judgment directing a refund. The instant case was heard on a different factual showing. Here the court was aware of the fact that the improvement, far from having been abandoned, as the *Woodruff* case held, was actually completed. On this factual showing, the Appellate Court reversed the summary judgment entered by the Circuit Court and remanded the cause for trial on the factual issue of abandonment. The Supreme Court denied petition for leave to appeal.

The mere fact that Woodruff, on one factual situation, recovered, does not deprive petitioner of the equal protection of the laws because the changed facts preclude recovery by her.

The record in this case discloses no abandonment of the improvement, in fact, it shows that the improvement has been completed. Abandonment, under the authorities, is a matter of intention. In *District of Columbia* v. *Thompson*, 281 U. S. 25, 73 L. ed. 677, cited by petitioner (Pet. 7) this court emphasized the absence in the pleadings and proof of a desire or intention to make the public improvement at any future time. Because of the absence of such desire or intention in the pleadings and proof, this court held the improvement abandoned. But in *Boss* v. *District of Columbia*, 134 Fed. (2) 14, notwithstanding the delay, the improvement was finally completed by the time of the trial. The court held that there was no abandonment or intention to abandon and held against the plaintiff's claim for refund.

McConville v. *City of St. Paul*, 75 Minn. 383, 77 N.W. 993, cited by petitioner (p. 8) is distinguishable on the same ground, and the same is true of *Bradford* v. *City of Chicago*, 25 Ill. 141, cited in the petition (p. 8). There the

court pointed out that the special assessment was paid on a void assessment roll, that (p. 352) the improvement could not be carried out on the void assessment, that "it being void avoids the whole undertaking, and is equivalent to an actual abandonment."

These cases were analyzed and distinguished in the *Boss* case. The law is clear that evidence of abandonment must be clear and convincing. Even a non-user of a road for a long period of time has been held not to be conclusive evidence of abandonment. *Cox* v. *Commissioners of Highways,* 194 Ill. 355, 360; *Durfee* v. *P. D. & E. Ry. Co.,* 140 Ill. 435, 439. There must not only be an apparent abandonment but the intention to abandon must be clearly and satisfactorily proved. *Shirk* v. *City of Chicago,* 195 Ill. 298, 313.

This record discloses that far from being abandoned the improvement has been completed. Neither the facts nor the law indicate any reason for this court to allow certiorari in this case.

CONCLUSION.

It is evident from what we have hereinbefore discussed that the jurisdictional propositions here relied upon by petitioner as a basis for this court's assumption of jurisdiction are unsound. The facts show no abandonment of the improvement which could possibly form a foundation for petitioner's claim that her constitutional rights have been violated either on the ground of "just compensation", "due process", or "impairment of contract".

We respectfully submit that no Federal constitutional question is involved and that the petition for writ of certiorari should be denied.

Respectfully submitted,

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